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No. 77-1700

In the Supreme Court of the United States

OCTOBER TERM, 1978

WESTPORT TAXI SERVICE, INC., ET AL., PETITIONERS

v.

BROCK ADAMS, SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

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Petitioners contend that the court of appeals erred in upholding the decision of the Secretary of Transportation that a taxi business like petitioners', which offers taxi services for the exclusive use of individuals or private groups, is not a "mass transportation company" within the meaning of 49 U.S.C. 1602(e).

1. The relevant facts are concisely stated in the court of appeals' opinion (Pet. App. A-19 to A-24). Respondent Westport Transit District is a governmental entity formed in 1969 by the town of Westport, Connecticut. In 1976 the Transit District applied to the Administrator of the Urban Mass Transportation Administration (UMTA) for a grant of approximately $610,000 to help implement a demonstration mass transportation project. In July 1976 the Administrator approved a grant for a two-year

project. The project envisions a number of new services; the service of principal concern to petitioners is a proposed "shared ride" taxi service to be provided by a number of new twelve-paggenger vans (Pet. App. A-21 to A-22).

Petitioners are licensed by the State of Connecticut to operate an "exclusive ride" taxi service in Westport. They own five conventional taxicabs. The distinguishing feature of their "exclusive ride" license is that they may carry two or more passengers going to different locations only if they obtain the consent of the first passenger. Under a "shared ride" service, in contrast, no passenger may insist that the vehicle be reserved exclusively for his trip (Pet. App. A-22).

Fearing that the Transit District's planned "shared ride" taxi service would harm their enterprise, petitioners brought suit in December 1976, seeking to enjoin the Secretary of Transportation from funding the project. They alleged, *inter alia*, that respondents had not complied with Section 3(c) redesignated as 3(e) of the Urban Mass Transportation Act of 1964, 78 Stat. 303, as amended, 49 U.S.C. 1602(e). Section 3(e) provides in pertinent part that no financial assistance shall be given to a state or local body for "the operation of mass transportation facilities" that would compete with an "existing mass transportation company," unless the Secretary makes certain findings, including findings that the assistance is essential to the program and that, to the extent feasible, private mass transportation companies will be able to participate in the program. Here the Secretary made no such findings because he concluded that petitioners' business is not an "existing mass transportation company" (Pet. App. A-23 to A-24).

The district court ruled that Section 3(e) is not applicable to demonstration projects such as the Westport plan (Pet. App. A-8). The court of appeals found that the section is applicable to demonstration projects, but it held

that, in light of administrative interpretation and practice, as well as the legislative history of the Act, petitioners could not claim the protection of Section 3(e) because they do not operate a "mass transportation company" (Pet. App. A-27 to A-30).[1]

2. The court of appeals correctly concluded that Westport Taxi is not a "mass transportation company" within the meaning of Section 3(e). There is no conflict on that issue or any other reason warranting this Court's review.

For the purposes of determining whether a transportation company is "a mass transportation company" within the meaning of the statute, the Secretary has distinguished between companies that provide a service that may be reserved exclusively by individuals or groups (*e.g.*, charter buses, limousines, and most taxis) and companies that provide a shared-ride service (*e.g.*, ordinary buses). See Bingham Affidavit, Pet. App. A-71 to

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[1]Petitioners also asserted in the courts below that Section 3(d) of the Urban Mass Transportation Act had not been complied with. Section 3(d), 49 U.S.C. 1602(d), requires that an application for UMTA funds include a certification that the applicant has given the public an opportunity for a hearing on the transportation plan, has considered the economic, social and environmental impact of the plan, and has found the plan to be consistent with official goals for the comprehensive development of the urban area. The district court held that, since the Westport plan was a demonstration project, it did not have to comply with this section (Pet. App. A-6 to A-7). The court of appeals reversed and remanded with instructions that an order be entered enjoining the disbursement of federal funds until Westport's application had been amended to include the requisite certification (Pet. App. A-30). The certification was thereafter duly filed and the injunction dissolved (Pet. 15 n. 6). Petitioners do not pursue their claim concerning Section 3(d) here.

A-75; Pet. 21 n. 8. Petitioners' service falls within the former category.[2] The distinction employed by the Secretary is consistent with the common and ordinary understanding of the term "mass transportation" (see *Ernst* v. *Ernst* v. *Hochfelder*, 425 U.S. 185, 199 n. 19) and with the legislative history of the Act.

"Mass transportation" was originally defined by the Act as transportation by bus, rail or other conveyance "moving over prescribed routes." See Section 9(d)(5), 78 Stat. 307. That definition clearly excluded taxi companies, because they do not move over prescribed routes. The definition was expanded by the Housing and Urban Development Act of 1968, Section 702, 82 Stat. 535 to cover transportation by bus, rail or other conveyance that provide a service to the public "on a regular and continuing basis." Despite the broadening of this language, however, the legislative history indicates that the purpose of the change was not to include every form of transportation for hire, but rather was "to allow greater flexibility in developing and applying *new* concepts and systems in urban mass transportation programs" (emphasis supplied). S. Rep. No. 90-1123, 90th Cong., 2d Sess. 76-77 (1968). As the court of appeals noted (Pet. App. A-29), the exclusive taxi service offered by petitioners is not a "new" concept or system.

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[2]Although petitioners characterize their business as providing a "shared ride" service (Pet. 12), they concede that the state regulations governing their service permit additional passengers only with the consent of the first passenger (*ibid.*). Thus, under state law, petitioners must offer a service that may be exclusively reserved by individuals. That is the principal difference between petitioners' business and the shared-ride service proposed by the Transit District.

[3]The present definition, which is codified at 49 U.S.C. 1608(c)(5), provides:

> The term "mass transportation" means transportation by bus, rail, or other conveyance, either publicly or privately owned, which provides to the public general or special service (but not including school buses or charter or sightseeing service) on a regular and continuing basis.

The Secretary has consistently interpreted the statutory definition as meaning that exclusive ride taxi services are not "mass transportation companies."[4] Because the Secretary's interpretation is reasonable, consistent, and in accord with the legislative history, the court of appeals correctly upheld it. See, *e.g.*, *Zenith Radio Corp.* v. *United States*, No. 77-539, decided June 21, 1978, slip op. 6-7.[5]

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[4]Petitioners err in contending (Pet. 18) that the Secretary's conclusion that their business is not a "mass transportation company" is inconsistent with his determination that the Transit District's proposed services constitute "mass transportation facilities." That claim overlooks the principal distinction employed by the Secretary: namely, that petitioners' taxi services are subject to exclusive reservation, while the Transit District's services are offered on a shared-ride basis.

Petitioners also err in contending (Pet. 22-26) that the Secretary's position is inconsistent with earlier policy statements and practices. Nothing in UMTA's policy statement on paratransit services or in statements of agency officials (cited at Pet. 22-24) suggests that an *exclusive ride* taxi service is a mass transportation company. Indeed, those statements acknowledge that a local taxi service may not provide "mass transporation services" (Pet. 22). And the court of appeals correctly held that the two instances in which UMTA funded private taxicabs companies to perform specialized services to the handicapped and elderly (see 49 U.S.C. (and Supp V) 1612) do not "detrac[t] from the persuasive force of UMTA's interpretation" (Pet. App. A-29, 30 n. 5).

[5]Although petitioners assert (Pet. 4) that UMTA's funding of the Transit District constitutes a "taking" of their property without compensation, the court of appeals correctly rejected that argument (Pet. App. A-24 n. 3).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JULY 1978.